Federal Court  Cour fédérale

Date: 20171103

Docket: IMM-1038-17

Citation: 2017 FC 996

Ottawa, Ontario, November 3, 2017

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SOYEON JANG

Applicant

and

THE MINISTER OF IMMIGRATION, CITIZENSHIP AND REFUGEES

Respondent

JUDGMENT AND REASONS

[1] Soyeon Jang seeks judicial review of a decision refusing to reconsider the denial of her application for permanent residence in Canada on humanitarian and compassionate grounds. I have concluded that the reconsideration decision should be set aside as the Officer dealing with the application erred in her treatment of the psychiatric evidence regarding Ms. Jang's mental health.

I. Background

[2] Ms. Jang was born in North Korea. She states that after years of great deprivation in North Korea, she fled to China with her mother. Shortly after arriving in China, Ms. Jang claims that she was kidnapped by human traffickers and sold to a farmer, who she was forced to marry. She says that she endured physical and sexual abuse at the hands of both her traffickers and her husband before she was able to escape to South Korea, where she ultimately obtained South Korean citizenship.

[3] Once she was in South Korea, Ms. Jang asserts that she became active in campaigns against the repressive North Korean regime. She came to fear that her activism would make her a target for assassination by agents of North Korea. Consequently, in 2011, Ms. Jang says that she fled to Canada, where she ultimately succeeded in obtaining refugee protection under a different name, on the basis that her political opinions would put her at risk in North Korea.

[4] In the course of her refugee claim, Ms. Jang did not disclose the fact that she had actually spent several years living in South Korea after fleeing China, nor did she reveal that she had obtained South Korean citizenship. This information subsequently came to the attention of immigration authorities, and resulted in a decision by the Immigration and Refugee Board to vacate Ms. Jang's status as a refugee. The Board found that Ms. Jang had misrepresented her identity and her citizenship in the context of her refugee claim.

[5] After her refugee protection was vacated, Ms. Jang applied for a Pre-removal Risk Assessment, asserting that she would be at risk in South Korea because of her political activities against the North Korean regime in both Canada and South Korea. A PRRA Officer concluded, however, that Ms. Jang could live safely in South Korea.

[6] Ms. Jang also sought permanent residence in Canada on humanitarian and compassionate (H&C) grounds. Her H&C application was also rejected. Ms. Jang then sought leave to bring an application for judicial review of this decision. This application was settled without a hearing, and the matter was referred back for redetermination.

[7] Ms. Jang's counsel on the initial redetermination of her H&C request then submitted additional materials in support of her application, including evidence with respect to Ms. Jang's mental health. This included a psychiatric report prepared by Dr. Parul Agarwal, which stated that Ms. Jang suffered from Post-traumatic Stress Disorder and major depressive episodes. The doctor further stated that Ms. Jang would be "at a very high risk of attempting and completing suicide if she were forced to return to South Korea".

II. The June 2016 H&C Reconsideration Decision

[8] An H&C Officer reconsidered Ms. Jang's H&C application in June 2016, finding, amongst other things, that the psychiatric evidence regarding Ms. Jang's mental health should be given little weight. In coming to this conclusion, the Officer noted that the report was based on information obtained from Ms. Jang, whose evidence the Officer found to be unreliable. The Officer further found that the probative value of the psychiatric report was undermined by the fact that although Dr. Agarwal had recommended that Ms. Jang follow a course of anti-depressant medication, and that she participate in trauma-focussed individual therapy, there was no evidence that she had pursued either of these treatments.

[9] The fact that Ms. Jang had only seen the psychiatrist on one occasion, coupled with the lack of follow-up treatment and the fact that "the most crucial component of her treatment" was identified as being the removal of the stress associated with her potential return to South Korea

led the Officer to conclude that the report had been prepared for immigration reasons, and not to seek support for Ms. Jang's mental health.

[10] Ms. Jang did not seek judicial review of this decision. Instead, in February of 2017, she applied to have the June 2016 decision reconsidered on the basis of new evidence. This new evidence included several letters of support, as well as some 45 articles dealing with the mental health conditions of North Korean defectors in South Korea, and the availability of treatment for mental health problems in South Korea.

[11] Also included with Ms. Jang's request for reconsideration was a second psychiatric report, this one prepared by Dr. Paul Uy. This report stated that Ms. Jang suffered from Post-traumatic Stress Disorder and major depressive episodes, that she would be at "a high risk of suicide" if she were forced to return to South Korea, and that her compromised mental state would negatively affect her ability to obtain medical assistance in that country.

[12] The submissions filed on Ms. Jang's behalf also addressed the concerns identified in the H&C Officer's June 2016 decision with respect to the opinion of Dr. Agarwal, including Ms. Jang's failure to seek any follow-up treatment for her mental health conditions. Both Dr. Uy's report and the submissions filed by Ms. Jang's counsel in support of her reconsideration request noted that she had been unable to afford therapy. Counsel also provided evidence that Ms. Jang was now being prescribed anti-depressants.

III. The February 2017 Reconsideration Decision

[13] In a brief letter dated February 22, 2017, the H&C Officer informed Ms. Jang that her further request for reconsideration was refused. The Officer stated that the delay of eight months

before requesting the reconsideration militated against reconsideration. The Officer further noted that Ms. Jang's new submissions were "very similar" to the information that had previously been considered and that most of the articles that she had provided with her reconsideration request pre-dated the June 2016 decision.

IV. Analysis

[14] Although Ms. Jang has raised several issues in her application for judicial review, it is not necessary to address all of them as I am satisfied that the Officer erred in her treatment of the psychiatric evidence included with the reconsideration request.

[15] As the Federal Court of Appeal observed in *Kurukkal v. Canada (Citizenship & Immigration)*, 2010 FCA 230, 406 N.R. 313, the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings such as H&C applications, and that H&C Officers have the discretion to reconsider an earlier decision. Upon receiving a request for reconsideration, an H&C Officer must consider whether, taking all of the relevant circumstances into account, he or she should exercise the discretion to reconsider an earlier H&C decision: *Kurukkal*, at para. 5.

[16] In this case, the H&C Officer recognized that she had the discretion to reconsider her June 2016 decision. However, her finding that it was not appropriate to do so was, in my view, tainted by procedural unfairness, and was, moreover, unreasonable.

[17] Insofar as the issue of procedural fairness is concerned, the Court's task is to determine whether the process followed by the decision-maker in a given case satisfied the level of fairness

required in all of the circumstances, in other words, to apply the correctness standard: *Mission Institution v. Khela,* 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502.

[18] As noted earlier, the Officer stated in her June 2016 decision that she would give little weight to Dr. Agarwal's expert opinion because his report was based on information obtained from Ms. Jang, whose evidence the Officer found to be unreliable. While acknowledging that it was not open to the Officer to substitute her own diagnosis for that of Dr. Agarwal, counsel for the Respondent acknowledged at the hearing that the Officer was essentially saying that she did not believe Ms. Jang's story of deprivation and persecution in North Korea and China, and that that was why the Officer discounted the probative value of Dr. Agarwal's report.

[19] This is not a case where an applicant for H&C relief is attempting to rely on a story that has previously been found not to be credible following an oral hearing by the IRB. In such circumstances, an applicant's claim of past persecution as hardship can be readily discounted.

[20] In this case, Ms. Jang's story of deprivation and persecution in North Korea and China had evidently been accepted as credible by the Refugee Protection Division of the Immigration and Refugee Board, as she was recognized to be a Convention Refugee. The decision vacating Ms. Jang's refugee status simply refers to her failure to disclose her South Korean citizenship, and determines that she could reside safely in that country. As a result, her refugee status was vacated. At no time did the Board make any negative credibility findings with respect to Ms. Jang's story of extreme deprivation and persecution in North Korea and China. Nevertheless, the H&C Officer came to the conclusion that Ms. Jang's story was simply not believable.

[21] The Immigration, Refugees and Citizenship Canada manual dealing with the processing of H&C applications states where the credibility of an applicant for H&C relief is central to an Officer's decision, the applicant should be interviewed. Moreover, as this Court observed in *Diaby v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 742 at para. 63, 460 F.T.R. 188, the failure to do so constitutes a breach of procedural fairness.

[22] Ms. Jang expressly asked that she be granted an interview in relation to her initial reconsideration request. She never received a response to that request, and she was never interviewed prior to the Officer rendering her June 2016 decision refusing H&C relief. Although she was not a qualified psychiatrist, the Officer rejected the psychiatric evidence before her largely because it was based, at least to a certain extent, on Ms. Jang's history – a history that the Officer had determined was not to be believed. This constitutes a breach of procedural fairness in the process leading up to the June 2016 H&C decision.

[23] I recognize that the application currently before me does not seek judicial review of the June 2016 decision, but rather the February 2017 refusal to reconsider that decision. However, the procedural error committed in relation to the June 2016 decision was effectively imported into the February 2017 decision when the Officer rejected the probative value of Dr. Uy's report for the same reason that she discounted Dr. Agarwal's earlier report.

[24] I am, moreover, satisfied that the Officer's February 2017 assessment of the new evidence was unreasonable.

[25] The duty of Officers in considering mental health evidence in the context of H&C applications was recently canvassed by the Supreme Court of Canada in *Kanthasamy v. Canada*

(Citizenship and Immigration), 2015 SCC 61, [2015] 3 S.C.R. 909. The Supreme Court found that once an H&C Officer has accepted a psychiatric diagnosis, it is unreasonable for the Officer to discount a psychiatric report because an individual did not seek follow-up treatment for the mental health concerns identified in the report.

[26] In this case, the H&C Officer did *not* accept Dr. Agarwal's psychiatric diagnosis. One of the principle reasons cited by the Officer for giving little weight to Ms. Jang's mental health issues was that she had provided no evidence that she had participated in therapy or taken the antidepressants that had been recommended by Dr. Agarwal. In other words, the Officer used Ms. Jang's failure to follow up with the treatment recommended by Dr. Agarwal as a basis for discrediting his professional opinion.

[27] Ms. Jang's February 2017 request for reconsideration specifically addressed the issue of follow up treatment. Ms. Jang's counsel provided the Officer with evidence showing that she was now being prescribed antidepressant medication. Moreover, Ms. Jang's written submissions and Dr. Uy's report explained that she had not followed up with the therapy recommended by Dr. Agarwal after his assessment because she did not have the financial resources to do so.

[28] This evidence was *not* similar to the evidence that had been before the Officer when Ms. Jang's H&C application was first considered. Indeed, the new evidence provided to the Officer in February of 2017 was intended to directly counter one of the Officer's reasons for discounting the psychiatric evidence that was before her in June of 2016.

[29] It is true that a tribunal is not required to refer to every piece of evidence in the record, and will be presumed to have considered all of the evidence that is before it: see, for example,

Hassan v. Canada (Minister of Employment and Immigration) (1992), 147 N.R. 317, 145 F.T.R. 289 (F.C.A.). That said, the more important the evidence that is not specifically mentioned and analyzed in the tribunal's reasons, the more willing a court may be to infer that the tribunal made an erroneous finding of fact without regard to the evidence: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998) 157 F.T.R. 35 at paras.14-17, [1998] F.C.J. No. 1425.

[30] The fact that the Officer described Dr. Uy's opinion as being similar to that of Dr. Agarwal raises a strong inference that the Officer overlooked the explanation provided for Ms. Jang's failure to follow up with the treatment plan recommended by Dr. Agarwal. This evidence directly counters a central basis for the Officer's finding that Dr. Uy's professional opinion should receive little weight, and should thus have been expressly considered by the Officer.

[31] Finally, both Dr. Agarwal and Dr. Uy identify very serious concerns with respect to the impact that Ms. Jang's removal to South Korea would have on her mental health. Both doctors raise the concern that the stress of her removal to a country where Ms. Jang believes her life to be at risk may cause her to become acutely suicidal. Having discounted the probative value of the two psychiatric opinions, however, the Officer never came to grips with this evidence.

[32] Finally, I would also note that as the Supreme Court observed in *Kanthasamy*, it is unreasonable for an H&C Officer to discount evidence as to the effect of removal from Canada on the mental health of an individual because of the availability of treatment in the individual's country of origin: *Kanthasamy* at para. 48.

V. Conclusion

[33] Ms. Jang's failure to disclose her South Korean citizenship certainly does not reflect well on her, and is a factor that will inevitably weigh against her to some extent in the assessment of her application for permanent residence on humanitarian and compassionate grounds. That said, she is entitled to have her H&C application considered fairly, and for the evidence that she adduces in support of her application to be assessed reasonably.

[34] Consequently, the application for judicial review is granted. I agree with the parties that the case is fact-specific and does not raise a question for certification.

JUDGMENT IN IMM-1038-17

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted to a different Officer for re-determination

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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